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No. 84-1703

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

ANTHONY EHLENFELDT,
Petitioner

V.

C. W. TRANSPORT, INC., LOCAL UNION NO. 710 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, WILLIAM CLOSE, THOMAS O'MALLEY, LEROY RANKIN AND FRANK WSOL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF UNION RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Court below properly found that the Defendant Union did not breach its duty of fair representation in the presentation of an employee grievance before a joint committee empowered to hear and decide disputes arising under a collective bargaining agreement?

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OPINION BELOW

The unpublished decision of the Court of Appeals appears in Appendix A of Petitioner Ehlenfeldt's ("Ehlenfledt") petition.

JURISDICTION

The judgment of the Court of Appeals was issued on January 29, 1985. The petition for writ of certiorari was docketed on April 29, 1985. This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

A.

Proceedings Below

Ehlenfeldt's action alleged that he was wrongfully terminated under the provisions of a collective bargaining agreement between Respondents C. W. Transport, Inc., ("the Company") and Local Union No. 710 I.B.T. (the "Union") and that the Union breached its duty of fair representation in the handling of his discharge grievance which was filed under the terms of the collective bargaining agreement, all in violation of 29 U.S.C. Section 185 ("Section 301"). On January 27, 1984 the District Court granted summary judgment in favor of the Union and the Company finding no breach of the duty of fair representation (Petit. App. at 6-17). On February 7, 1984 the District Court entered its judgment (Petit. App. at 20). On January 29, 1985 the Court of Appeals issued its order and judgment affirming the District Court (Petit. App. at 1-5, 18).[1]

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[1] The individually named Respondents are apparently not a part of this petition since the entire petition focuses on the action of the Union and Company and not the individuals. In any event, there is no individual liability under Section 301. See, *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981); *Atkinson v. Sinclair Refining Co.*, 370 U.S. 195 (1962).

B.

Statement of Facts

The facts relied on by the Court of Appeals are taken from Ehlenfeldt's depositions and the non-conclusionary facts in his complaint.[2]

Ehlenfeldt was discharged from his job as a truck driver for excessive delays in the delivery of freight. Ehlenfeldt claimed that the delay was necessitated by the fact that the cab of his vehicle filled with exhaust fumes and that his stop was a safety precaution.

The Union steward assisted Ehlenfeldt in filing a grievance and the Union agent, Wsol, unsuccessfully sought to persuade the Company to reinstate him.[3] The matter was then taken to the contract grievance procedure for a hearing before a joint committee empowered to make final and binding decisions on breaches of the collective bargaining agreement.

At the hearing before the joint committee, Ehlenfeldt was told several times that under the collective bargaining agreement's terms he was entitled to ten days notice of the hearing and that if he desired, he was entitled to additional time. Ehlenfeldt insisted that

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[2] We find it somewhat disturbing that the facts alleged by Ehlenfeldt in his Petition at 1-4 are, for the most part, the same unsupported conclusionary allegations that he simply was unable to substantiate after lengthy discovery when faced with the summary judgment motions in the District Court.

[3] During his deposition, Ehlenfeldt admitted that he told the Union agent Wsol everything he had to say concerning his discharge (Ehlenfeldt Dep. I at 34).

he wished the hearing to proceed that day.[4] The hearing proceeded and the Company's discharge of Ehlenfeldt was upheld. As Ehlenfeldt testified in his deposition, at the hearing Union agent Wsol argued that Ehlenfeldt was sick on the night in question as he claimed and that it was the Union's position that Ehlenfeldt should be reinstated to his job. Ehlenfeldt explained to the committee that he was sick because of the fumes in the cab. Ehlenfeldt was questioned about a prior warning letter and Ehlenfeldt explained that he thought that he rebutted that letter. Ehlenfeldt also explained that with regard to the discharge incident he only stopped for one hour and forty-five minutes and not three hours as the Company claimed and that he stopped a total of four times (Ehlenfeldt Dep. I at 41-42, 56-58). Towards the end of the hearing, a member of the committee asked Ehlenfeldt if he had anything else to say to the committee. Ehlenfeldt stated that he had nothing further to present (Ehlenfeldt Dep. I at 44-45, 57).[5]

Ehlenfeldt admitted that in the past he was terminated and as a result of a grievance filed and presented by the Union, the joint committee ordered that he be reinstated to his job (Ehlenfeldt Dep. I at 51-54). Further, Ehlenfeldt admitted that he has had no fights or

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[4] During his deposition, Ehlenfeldt stated that he voluntarily signed a waiver agreement (Close Dep. Exh. 4) which stated that he and the Company were ". . . aware of the issues in their dispute and do declare they are prepared for hearing of the dispute . . ." Ehlenfeldt testifed in his deposition (Ehlenfeldt Dep. II at 20-21):

Q: Did (the committee) ask you if you were ready to go ahead . . .?

A: Yeah.

Q: And you said you were?

A: That's why I signed it (the ten day waiver).

[5] Ehlenfeldt testified (Ehlenfeldt Dep. I at 57):

Q: Okay, so everything you wanted to say in support of your case was said?

A: I think so.

arguments with the Union officials and has maintained a friendly relationship with the officials with whom he dealt. Ehlenfeldt admitted that he never ran for union office, never did anything that would cause the Union to retaliate against him and was never threatened by Union officials. Ehlenfeldt also admitted that he had no evidence of fraudulent or dishonest conduct by the Union and no evidence that the Union and the Company conspired to terminate his employment (Ehlenfeldt Dep. I at 32, 46-51, 122).

REASONS FOR DENYING THE WRIT

A.

The Standard of Intentional Misconduct Is Not In Conflict With Prior Decisions of This Court

Ehlenfeldt argues that a standard of "intentional misconduct" is in conflict with prior decisions of this Court (Petit. at 5).[6] Significantly, Ehlenfeldt fails to mention the very cases from which the standard came. See, *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971) ("the doctrine . . . carries with it the need to adduce substantial evidence of discrimination that is *intentional*, severe, and unrelated to legitimate union objectives . . ."); *Humphrey v. Moore*, 375 U.S. 335, 348 (1964) (" . . . there is no substantial evidence of *fraud, deceitful action or dishonest conduct*") (emphasis added).

Ehlenfeldt's reliance upon *Hines v. Anchor Motor Freight, Inc.* 424 U.S. 554 (1976) as a basis for stating that the standard used by the

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[6] The "intentional misconduct" standard has been adopted by the Seventh Circuit. *Hoffman v. Lonza, Inc.*, 658 F.2d 519, 522-523 (7th Cir. 1981). See also, *Dober v. Roadway Express, Inc.*, 707 F.2d 292, 295 (7th Cir. 1983); *Graf v. Elgin, Joliet & Eastern Railway Company*, 697 F.2d 771, 777 (7th Cir. 1983); *Superczynski v. P.T.O. Services, Inc.*, 706 F.2d 200 (7th Cir. 1983). *Cf. Medlin v. Boeing Vertol Co.*, 620 F.2d 957, 961 (3rd Cir. 1980) ("To violate the duty . . . it is necessary that the union act with a bad faith motive").

Seventh Circuit is contrary to this Court's decision in *Vaca v. Sipes*, 386 U.S. 171 (1966) (Petit. at 6-8) is simply incorrect. See *Hoffman v. Lonza, Inc., supra*, 658 F.2d at 522 n.2:

> *Lockridge* is quite clearly the Supreme Court's most definitive amplification of the *Vaca* language. The Court stated in *Lockridge* that for employee Lockridge to make out a claim of breach of the duty of fair representation under (Section) 301 of the National Labor Relations Act, Lockridge must have proved, "arbitrary or bad-faith conduct on the part of the union." *Vaca v. Sipes, supra* (386 U.S.) at 193 (87 S.Ct. at 918). There must be 'substantial evidence of fraud, deceitful action or dishonest conduct.' *Humphrey v. Moore, supra* (375 U.S. 335) at 348 (84 S. Ct. 363, 11 L.Ed.2d 370)." *Hines v. Anchor Motor Freight*, 424 U.S. 554, 96 S. Ct. 1048, 47 L. Ed. 2d 231 (1975) does not represent a retreat by the Supreme Court from this interpretation of *Vaca*. In *Hines* the Court stated that the employees' burden in judicially challenging the result of the arbitral process "will remain a substantial one, far too heavy in the opinion of some." *Id.* at 570, 96 S. Ct. 1048, 47 L. Ed. 2d 231. The Court then asserted that arbitral decisions where the union's representation of the employee has been "dishonest, in bad faith, or discriminatory" are subject to relitigation. *Id* at 571, 96 S. Ct. 1048, 47 L. Ed. 2d 231. There is nothing in *Hines* to suggest that the "arbitrary" conduct of *Vaca* can be less than the "deliberate and severely hostile and irrational treatment" of *Lockridge*.

See also, *Superczynski v. P.T.O. Services, Inc., supra*, 706 F.2d at 202-203.

Therefore, the "intentional misconduct" standard is consistent with this Court's prior decisions.

B.

The Standard Utilized By the Seventh Circuit Is Not In Conflict With The Standards Utilized By Other Circuits To Justify Granting the Writ Since No Court Would Find A Breach Of the Duty Under The Facts In This Case.

Under the facts of this case - one where there is no evidence of fraud, deceitful action or dishonest conduct, and one where all the evidence that the employee desired presented at his discharge arbitration hearing was, in fact, presented - even under the cases cited by Ehlenfeldt (Petit. at 8-10), no court would find a breach of the duty of fair representation and no "conflict" or "split" exists justifying granting the writ. Indeed, the cases cited by Ehlenfeldt constitute the extreme and the language cited is taken out of context. See *Griffin v. International Union, United Automobile, Aerospace and Agriculture Implement Workers Of America, UAW*, 469 F.2d 181, 183-185 (4th Cir. 1972) ("negligence in handling a grievance has not been identified as breaching the union's duty of fair representation" . . . but a breach was found since the union filed the grievance with the very individual with whom the employee had a fight and evidence existed that "the Union's handling of the grievance . . . (had) been motivated by bad faith" due to "the friendship between" the Union official instrumental in dropping the employee's grievance and the individual with whom the employee had the fight); *Farmer v. ARA Services, Inc.*, 660 F.2d 1096, 1103-1104 (6th Cir. 1981) ("something more than simple negligence" is necessary . . . "(a) union is not liable for mere errors in judgment if they were made honestly and in good faith" but a breach was found where evidence showed the Union simply refused to arbitrate claims filed under its collective bargaining agreement and negotiated a contract perpetuating sexually discriminatory hiring and relegated female employees to lower paying classifications etc.); *Curtis v. United Transportation Union*, 700 F.2d 457 (8th Cir. 1983) (finding of district court that union breached the duty of fair representation *reversed* since "(m)ere negligence, poor judgment or ineptitude are insufficient to establish a breach of the duty . . . there must be evidence that the union acted without concern or solicitude, or gave a claim only cursory attention . . . (a) 'union representative is not

a lawyer and he cannot be expected to function as one'"); *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1272-1273 (9th Cir. 1983) ("simple negligence" insufficient in cases involving conduct other than purely ministerial acts); *Foust v. International Brotherhood of Electrical Workers*, 572 F.2d 710 (10th Cir. 1978) *modified*, 442 U.S. 42 (1979) (failure to perform a ministerial act of timely filing a grievance).[7]

This case obviously did not involve the extreme facts in those cases cited by Ehlenfeldt and did not involve an alleged breach over the purely ministerial act of filing a timely grievance. This case involved the full presentation of Ehlenfledt's grievance at an arbitration hearing. Even under Ehlenfeldt's authority, no court would find a breach of the duty in this case.

A survey in the other circuits shows that no court would find a breach of the duty of fair representation in this case. *See National Treasury Employees Union v. Federal Labor Relations Authority*, 721 F.2d 1402, 1406 (D.C. Cir. 1983) (breach found where union adopted a policy of furnishing legal counsel with respect to grievance and other matters only to members. "The duty of fair representation does not establish an objective standard of 'adequate representation' that the union must meet at a minimum . . . (r)ather . . . a union may adopt virtually *any* non-arbitrary standard for providing representation of individual employees, so long as the standard adopted is applied in a nondiscriminatory manner . . ." (emphasis in original)); *Early v. Eastern Transfer et al.*, 699 F.2d 552, 555 (1st Cir. 1983) *cert. denied*, 104 S.Ct. 93 (1983) (fact that union lost a meritorious arbitration case does not establish a breach of the duty of fair representation since "(m)ere negligence of the union does not amount to such a breach"); *Jensen et al v. Farrell Lines, Inc. et al*, 658 F.2d 27, 29 (2nd Cir. 1981) (no breach where rational arguments were made to arbitrator); *Peterson v. Lehigh Valley District Council, United Brotherhood of Carpenters and Joiners, et al*, 676 F.2d 81, 87 (3rd Cir. 1982); *Wyatt v. Interstate & Ocean Transport Company*, 623 F.2d 888,

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[7] This Court's grant of certiorari in *Foust* and the subsequent reversal was limited to the punitive damages issue and the finding of breach of the duty was simply assumed as correct. 442 U.S. at 45 n.4, 46 n.7.

890-891 (4th Cir. 1980) (breach of duty requires conduct which is in bad faith, discriminatory, or so indifferent or grossly deficient as to be arbitrary - breach cannot be predicated upon simple negligence); *White v. Arco/Polymers, Inc.*, 720 F.2d 1391, 1397 (5th Cir. 1983) (union was not required to anticipate and investigate every possible argument in behalf of employee);[8] *Ruzicka v. General Motors Corp. et al*, 707 F.2d 259, 260 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 424 (1983) (reliance on past practice justifies union's action); *Brown v. Trans World Airlines, Inc.*, 746 F.2d 1354, 1358 (8th Cir. 1984) (". . . the ultimate standard governing plaintiff's unfair representation claim is not one of attorney malpractice or of negligence . . . negligence is not sufficient to establish a breach of the duty . . ."); *Castelli v. Douglas Aircraft Company*, 752 F.2d 1480, 1482-1483 (9th Cir. 1985) (union's lack of adequate investigation of grievance and failure to call key witnesses is not a breach since ". . . the grievance process need not be error free - to constitute a breach of the duty of fair representation, more than a mere error of judgment must occur (citing *Hines, supra*, 424 U.S. at 571) . . . As a result, courts will interfere with union decisions about employee grievance proceedings only if a union shows reckless disregard for the rights of an employee . . . Mere negligence on the part of the union does not constitute a breach of the union's duty . . . (i)n general, evidence of hostility, arbitrariness or bad faith is required"); *Foust v. International Brotherhood of Electrical Workers, supra*, 572 F.2d 710 (10th Cir. 1978), modified, 442 U.S. 42 (1979); *Smith v. Babcock & Wilcox Company, etc.*, 726 F.2d 1562, 1565 (11th Cir. 1984) (lack of enthusiasm by union in pursuing employee claim is not a breach).

Thus, under any circuit's interpretation of the duty, under the facts of this case, no breach would be found. This case did not involve a ministerial act of filing a grievance in a timely fashion, which may or may not be the subject of shadings and debate in some cir-

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[8] See also *Hart v. National Homes Corporation*, 668 F.2d 791, 794 (5th Cir. 1982) ("A union must be given certain latitude in resolving how the investigation and processing of a grievance is to be conducted. The legal question is not whether the employee is satisfied with the representation ... or whether it was perfect" (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953))).

cuits as to whether negligence in performing purely ministerial acts constitutes a breach of the duty of fair representation. *See e.g., Dutrisac v. Caterpillar Tractor Co., supra,* 749 F.2d 1270. *Cf. Graf v. Elgin, Joliet & Eastern Railway Company, supra,* 697 F.2d 771; *Ruzicka v. General Motors Corp., et al, supra,* 707 F.2d 259. This case involved the full presentation of a grievance in an arbitration hearing, where, as shown above, no court considers negligence as a breach of the duty. The best case Ehlenfledt could hope to make out was one of negligence by the Union and such is not a breach. In any event, the actions of the Union in this case show its conduct was far from being negligent. Ehlenfeldt voluntarily stated at the hearing that he was prepared to proceed on the day of the hearing and everything he wanted presented in support of his case was presented.

C.

The Seventh Circuit Did Not Err By Applying The Intentional Misconduct Standard To The Facts In This Case

Ehlenfeldt quotes from the decision of the District Court, but again fails to point to the relevant holding. The District Court stated (Petit. App. at 16):

> This is not just a weak case. Under the facts brought to the Court's attention for this motion, it is an impossible case because there is no evidence from which intentional misconduct on the part of the union can be inferred.

Ehlenfeldt makes the same unsupported, almost paranoid argument that the Union had a "motive to deprive Ehlenfeldt of his substantial pension benefits" therefore creating a material issue of fact warranting trial (Petit. at 10-11). As found by the Court of Appeals (Petit. App. at 4-5) there was "not a shred of evidence to support"

such a theory.[9] Coupled with Ehlenfeldt's admitted good relationship with the Union and Ehlenfeldt's admissions that all the evidence he wanted presented in behalf of his case before the joint committee was, in fact, presented and the total lack of any evidence to support an illegal motive by the Union, the standard was properly applied to the facts of this case. Ehlenfeldt's arguments about the alleged deficiencies of the presentation by the Union are nothing more than Monday morning quarterbacking and, in any event, are irrelevant since Ehlenfeldt admitted that he agreed to proceed with the hearing and all the evidence he cared to have presented in support of his case was presented by the Union.[10]

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[9] The "strained" assertion that the Union breached the duty of fair representation because it "allowed the Company to present evidence at the hearing which should have been disallowed pursuant to the collective bargaining agreement" (Petit. at 3) only points up the frivolity of this petition. That assertion is akin to saying that either the Union or the Company could "allow" a Court to do or not to do something. The Union is only a party to the discharge hearing. The committee decides the relevancy of evidence.

[10] As noted, union agents representing employees before grievance committees are not held to the same standard of care that a lawyer owes his client. *See Curtis v. United Transportation Union, supra,* 700 F.2d at 458 ("A 'union representative is not a lawyer and he cannot be expected to function as one'"); *Dober v. Roadway Express, Inc., supra,* 707 F.2d at 294-295; *Graf v. Elgin, Joliet & Eastern Railway, supra,* 697 F.2d at 779.

CONCLUSION

Wherefore, for the above reasons, the Union Respondents submit that the Petition should be denied.

Respectfully submitted,

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